92-1500

No. 92-_____



In The
**SUPREME COURT OF THE UNITED STATES**
October Term, 1992

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PAUL CASPARI, Superintendent of the Missouri Eastern Correctional Center, and JEREMIAH W. (JAY) NIXON, Attorney General of Missouri,
Petitioners,
v.
CHRISTOPHER BOHLEN,
Respondent.

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# PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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# PETITION FOR A WRIT OF CERTIORARI

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## QUESTIONS PRESENTED FOR REVIEW

I.

**WHETHER THE DOUBLE JEOPARDY CLAUSE WHICH PROHIBITS THE STATE FROM SUBJECTING A DEFENDANT TO SUCCESSIVE CAPITAL SENTENCING PROCEEDINGS SHOULD APPLY TO SUCCESSIVE NON-CAPITAL SENTENCE ENHANCEMENT PROCEEDINGS.**

II.

**WHETHER THIS COURT'S DECISION IN BULLINGTON V. MISSOURI, 451 U.S. 430 (1981) EXPANDS THE PROTECTION AFFORDED BY THE DOUBLE JEOPARDY CLAUSE CONTRARY TO THE ORIGINAL INTENT OF THE CLAUSE AS ARTICULATED BY THE FRAMERS OF THE CONSTITUTION AND BEYOND THE TRADITIONAL PROTECTIONS OF THE CLAUSE.**

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PETITION FOR WRIT OF CERTIORARI
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## OPINIONS BELOW

The October 16, 1992 panel opinion of the United States Court of Appeals granting the petition for writ of habeas corpus is reported at 979 F.2d 109 (8th Cir. 1992), and is included in the Appendix at A-3. The order of the United States District Court for the Eastern District of Missouri denying the petition for writ of habeas corpus is not reported but is

included in the Appendix (A-25). The magistrate's report and recommendation is not published, but is included in the Appendix (A-27).



## JURISDICTIONAL STATEMENT

The United States Court of Appeals for the Eighth Circuit issued its opinion on October 16, 1992. The motion for rehearing or rehearing *en banc* was denied on December 8, 1992. Pursuant to 28 U.S.C. §2201(c) and Supreme Court Rules 13.1 and 13.4, the present petition for writ of certiorari was required to be filed by petitioners within ninety days. Jurisdiction of this court is invoked under 28 U.S.C. §1254(1).

## CONSTITUTIONAL PROVISIONS

The Fifth Amendment to the United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, lliberty or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Section one of the Fourteenth Amendment to the United States Constitution provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

## STATEMENT OF THE CASE

Respondent was charged with robbing Blust Jewelry Store in the Town and Country Mall in St. Louis County. Respondent took currency and jewelry from the store and wristwatches from two employees. Respondent was convicted in the Circuit Court of St. Louis County, Missouri, of three counts of robbery first degree, §569.020, RSMo 1986, and sentenced as a prior and persistent offender under §558.016, RSMo 1986, to consecutive terms of fifteen years imprisonment on each count. The conviction was affirmed on direct appeal by the Missouri Court of Appeals. See ***State v. Bohlen***, 670 S.W.2d 119 (Mo.App. 1984) (A-63). However, the Court of Appeals remanded the cause to determine respondent's status as a prior and



persistent offender. *Id.* The Circuit Court found respondent to be a prior and persistent offender after receiving evidence that respondent had prior convictions for possession of heroin, unlawful delivery of a controlled substance and two (2) counts of violation of Illinois' Controlled Substance Act (A-75). The Court again sentenced respondent to consecutive terms of fifteen years imprisonment on each count. The sentences were affirmed on appeal after remand. *See* ***State v. Bohlen***, 698 S.W.2d 577 (Mo.App. 1985) (A-57).

Respondent also filed a post-conviction relief motion in the Circuit Court under former Missouri Supreme Court Rule 27.26 (repealed effective January 1, 1988). Upon denial of that motion, respondent appealed the Circuit Court's judgment to the Missouri Court of Appeals which affirmed. *See* ***Bohlen v. State***, 743 S.W.2d 425 (Mo.App. 1987).

On September 5, 1989, respondent filed a petition for writ of habeas corpus under 28 U.S.C. §2254 before the United States District Court for the Eastern District of Missouri (A-84). After responsive pleadings, Magistrate David Noce recommended that respondent's petition be denied (A-27). The Honorable Clyde Cahill sustained and adopted the Magistrate's Report and Recommendation and denied respondent's petition on August 28, 1991 (A-25).

The United States Court of Appeals for the Eighth Circuit reversed and remanded the district court's denial of respondent's petition for writ of

habeas corpus on October 16, 1992. *See* ***Bohlen v. Caspari***, 979 F.2d 109 (8th Cir. 1992) (A-3). The court ordered the respondent to be released from custody unless the state resentenced respondent without invoking the persistent offender statute. Rehearing was denied on December 8, 1992 (A-83).



## ARGUMENT
## I.

**WHETHER THE DOUBLE JEOPARDY CLAUSE WHICH PROHIBITS THE STATE FROM SUBJECTING A DEFENDANT TO SUCCESSIVE CAPITAL SENTENCING PROCEEDINGS SHOULD APPLY TO SUCCESSIVE NON-CAPITAL SENTENCE ENHANCEMENT PROCEEDINGS.**

The present case presents a significant question because it allows this Court to finally decide whether the holding in ***Bullington v. Missouri***, 451 U.S. 430 (1981) applying the Double Jeopardy Clause to capital sentencing proceedings is applicable in non-capital sentence enhancement proceedings, an issue that was expressly left undecided by this Court in ***Lockhart v. Nelson***, 488 U.S. 33, 37 n.6 (1988). The present case also allows this Court to resolve the conflicts among the lower courts, state and federal, regarding the application of the Double Jeopardy Clause to non-capital enhancement proceedings. *See* ***Hunt v. New York***, 112 S.Ct. 432 (1991) (White, J., dissenting from denial of certiorari).

In ***Bullington v. Missouri***, *supra*, this Court applied the Double Jeopardy Clause to capital sentencing proceedings. The holding in ***Bullington*** rested on a belief that capital sentencing is different. *See* ***Barefoot v. Estelle***, 463 U.S. 880, 913 (1983) (Marshall, J. dissenting) ("Time and again the court has condemned procedures in capital cases that

might be completely acceptable in an ordinary case. *See, e.g.*, ***Bullington v. Missouri***, 451 U.S. 430, 101 S.Ct. 1852, 68 L.Ed.2d 270 (1981)").

Though the Double Jeopardy Clause prohibits retrial of a defendant who has been acquitted of the crime charged, it does not extend to the "imposition of a particular sentence" because a sentence is not regarded as an acquittal. ***Bullington v. Missouri***, *supra*, 451 U.S. at 437-38. In fact, the Double Jeopardy Clause does not prohibit the imposition of a harsher sentence after retrial. *Id.* As noted in ***Bullington***, the jury's discretion under Missouri's capital sentencing proceedings was limited to imposing either life imprisonment or capital punishment. *Id.* Moreover, the capital punishment proceeding consisted of opening statements, presentation of evidence, testimony, instruction to jurors and final arguments. *Id.*, 451 U.S. at 438 n. 10. In distinguishing ***North Carolina v. Pearce***, 395 U.S. 711 (1969), this court noted that unlike the jury in ***Pearce***, which had a wide range of punishment from which to choose, the jury in ***Bullington*** was restricted to either life imprisonment or capital punishment.

This court has previously rejected the application of the Double Jeopardy Clause to sentencing enhancement proceedings in the federal system. ***United States v. DiFrancesco***, 449 U.S. 117 (1980). Like the sentencing enhancement proceedings in ***DiFrancesco***, the judge could have sentenced respondent to a broad range of



punishment.[1] Since the judge could sentence respondent within a range of ten to thirty years or life, the reasoning of ***Bullington*** is inapplicable to non-capital enhancement proceedings. This lack of sentencing discretion that was a rationale for this Court's application of the Double Jeopardy Clause to capital sentencing proceedings is not present in this non-capital case. ***Bullington v. Missouri***, *supra*, 451 U.S. at 441.

The Court of Appeals determined that the Missouri's enhancement proceeding resembled a trial because the state had to prove respondent's prior convictions; thus, double jeopardy protections should be applicable. As noted by the Tenth Circuit in ***Linam v. Griffin***, 685 F.2d 369 (10th Cir. 1982), a case which the Eighth Circuit attempted to distinguish, a sentencing enhancement "is not a conviction of a distinct crime." *Id.* at 375. The enhancement proceeding is not "an ingredient of the judgment on the merits." *Id.* at 374.

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[1]Respondent was convicted on three (3) counts of the Class A felony of first degree robbery (§569.020, RSMo 1986) and sentenced under §558.011, RSMo 1986 to fifteen years imprisonment on each count. The range of punishment for a Class A felony is a term of imprisonment not less than ten years and not to exceed thirty years, or life imprisonment. As a persistent offender, the judge could sentence respondent only within the range of a Class A felony. §558.016, RSMo 1986.

***Green v. United States***, 355 U.S. 184 (1957) held that when an individual convicted of a lesser included offense obtains a new trial, he cannot be re-tried on the greater offense. If an individual is not found to be a persistent offender, this is not the same as an acquittal of a greater offense and a conviction of a lesser included offense. That is because a defendant may be acquitted of a crime but not of a sentence. The proceedings in ***Bullington*** required the jury to consider facts bearing upon the defendant's guilt or innocence. ***Linam v. Griffin***, *supra*, 685 F.2d at 375. Unlike capital sentence proceedings, the increase in sentence "has nothing to do with the basic cause being tried." *Id.* Rather, an enhancement proceeding is only a proceeding about the status of the defendant to determine whether he has previous convictions.

Not only did the ***Bullington*** court note the limited discretion placed on the jury in Missouri capital sentencing proceedings, it also noted that the punishment phase was a trial on the issue of punishment. However, the persistent offender hearing is not a trial on the punishment that the defendant should receive. Rather, if the defendant is found to be a persistent offender the statute merely authorizes the judge to enhance the sentence. Any error during the persistent offender hearing does not invoke the double jeopardy clause since it is not an adjudication: "Considering the fact that [the enhancement proceeding] in no way [can] be considered a guilt or innocence adjudication, it is almost like sending it back to mend the record."



***Linam v. Griffin***, *supra*, 685 F.2d at 376.

The grant of certiorari will also allow this Court to resolve the conflicts among the lower courts, state and federal, which have discussed the application of ***Bullington v. Missouri***, *supra*, to non-capital enhancement proceedings. Although the Court of Appeals' opinion calls the split among the Circuits "illusory", a closer look shows that the cases cited by Justice White in ***Hunt v. New York***, *supra*, clearly contrast with the holding by the Eighth Circuit Court of Appeals. The Court of Appeals also stated: "[t]o the extent that any of the other federal circuits or the Missouri courts have held to the contrary, we think they were mistaken". This language indicates that the Eighth Circuit Court of Appeals recognized inconsistencies among the circuits, and then expressly rejected those decisions as contrary to the panel's beliefs.

In ***Linam v. Griffin***, *supra*, the Tenth Circuit declined to apply ***Bullington*** to New Mexico's Habitual Criminal Act even though many of the protections afford a defendant at trial are extended to the habitual offender hearing. *Id.*, 685 F.2d at 372. Though the evidence in ***Linam*** was erroneously excluded, the holding in ***Linam*** was not based on the erroneous exclusion but rather because the sentencing proceeding in ***Bullington*** was an integral part of the trial. *Id.* at 375.

Likewise, the Seventh Circuit held that when the habitual offender statute does not "require consideration of the underlying facts on the

substantive charge" ***Bullington*** does not apply. ***Denton v. Duckworth***, 873 F.2d 144, 148 (7th Cir. 1989).

On the other hand, the Fifth Circuit applied the ***Bullington*** application to Texas' Habitual Offender statute. ***Bullard v. Estelle***, 665 F.2d 1347 (5th Cir. 1982), *vacated and remanded on other grounds*, 459 U.S. 1139 (1983). In ***Durosko v. Lewis***, 882 F.2d 357 (9th Cir. 1989), *cert. denied*, 495 U.S. 907 (1990), the Ninth Circuit, while acknowledging the Seventh Circuit's rejection of ***Bullington*** to non-capital enhancement proceedings, chose to follow the Fifth Circuit standard. *Id.* at 359.

Furthermore, the Missouri Court of Appeals held that remanding the cause back to the State Circuit Court because the state failed to establish the requisite statutory requirements for sentence enhancement did not invoke the Double Jeopardy Clause. ***State v. Bohlen***, 698 S.W.2d 577, 578 (Mo.App. 1985). The holding is consistent with that of the New York court's in ***State v. Hunt***, 579 N.E.2d 208 (N.Y. 1991), *cert. denied*, 112 S.Ct. 432 (1991).

Moreover, the Eighth Circuit's extension of ***Bullington v. Missouri***, *supra*, to non-capital enhancement proceedings should be barred under the implications of ***Teague v. Lane***, 489 U.S. 288 (1989). Since the present case comes before the court on collateral review, retroactivity is an issue that must be addressed. ***Graham v. Collins***, 113 S.Ct. 892, 897 (1993). This Court has never



extended ***Bullington*** to non-capital sentence proceedings. To the contrary, the issue was not addressed in ***Bullington***, and was expressly reserved in ***Lockhart v. Nelson***, *supra*, 488 U.S. at 37 n.6. Although the Court of Appeals held that the Missouri state court's determination that Double Jeopardy Clause does not apply to non-capital sentencing proceedings was irrelevant, the Missouri courts made a " 'reasonable, good-faith interpretation of existing precedents' ". ***Lockhart v. Fretwell***, 113 S.Ct. 838, 844 (1993), *quoting* ***Butler v. McKellar***, 494 U.S. 407, 414 (1990). The Court of Appeals finding that the state court's opinion was "mistaken" is irrelevant since the Missouri Court made a reasonable, good-faith interpretation of existing precedent. ***Teague*** protects state court judgments based on reasonable, good faith interpretation of federal law, even though those interpretations later prove incorrect.

The Court of Appeals' holding that "[e]xtending ***Bullington*** to non-capital sentencing enhancement hearings is not a sufficient stretch to cause it to be a new rule under ***Teague***" is erroneous. The mere fact that the Court of Appeals "stretch[ed]" ***Bullington*** is in itself sufficient to show it created a new rule. Of course, the lower court's "stretch" analysis is improper ***Teague*** analysis. Rather, the Court of Appeals should have examined the legal landscape from this Court to determine if respondent were requesting the Court of Appeals to create new law. ***Graham v. Collins***, 113 S.Ct. at 898. The survey of ***Bullington*** and ***Lockhart v. Nelson*** shows respondent's request for the application of "new law".

How can the Court of Appeals condemn the state court for failing to apply ***Bullington*** to non-capital enhancement proceedings when that court had to "stretch" the holding in ***Bullington*** to achieve this result? The Court of Appeals could not establish that this Court has applied ***Bullington*** to non-capital enhancement proceedings; nonetheless, the Court of Appeals went ahead and extended the ***Bullington*** standard to non-capital sentence enhancement proceedings. In doing so, it rejects this Court's principle of retroactivity. While this Court has granted certiorari in ***Gilmore v. Taylor***, 113 S.Ct. 52 (1992) to define "new law", the principle of ***Teague***, that the state should not be penalized for following "the constitutional standard that prevailed at the time the original proceedings took place," ***Teague***, *supra*, at 306, does not justify denying finality of respondent's criminal conviction eight years later.



## II.

**WHETHER THIS COURT'S DECISION IN BULLINGTON V. MISSOURI, 451 U.S. 430 (1981) EXPANDS THE PROTECTION AFFORDED BY THE DOUBLE JEOPARDY CLAUSE CONTRARY TO THE ORIGINAL INTENT OF THE CLAUSE AS ARTICULATED BY THE FRAMERS OF THE CONSTITUTION AND BEYOND THE TRADITIONAL PROTECTIONS OF THE CLAUSE.**

The application of the Double Jeopardy Clause to capital sentencing proceedings in ***Bullington v. Missouri***, 451 U.S. 430 (1981) should be reconsidered and reversed because it contradicts all previous precedents of this court.[2] Until ***Bullington***, this court never applied double jeopardy to sentencing decisions after retrial. Although the ***Bullington*** court may have been inclined to do so because "death is different", that rationale is grounded in the Eighth Amendment prohibition against cruel and unusual punishments, not the Double Jeopardy Clause.

This court's holding in ***Bullington*** clearly contradicts previous holdings in ***North Carolina v.***

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[2]The issue of whether ***Bullington*** remains good law should be reached only if the Court decides under question I that ***Bullington's*** Double Jeopardy Clause analysis is applicable to non-capital sentence enhancement proceedings.

***Pearce***, 395 U.S. 711 (1969) and ***United States v. DiFrancesco***, 449 U.S. 117 (1980). Although ***Bullington*** was distinguished from these cases because of the procedures employed during the sentencing proceedings, the analytical "difference is immaterial for the purposes of the Double Jeopardy Clause." ***Bullington v. Missouri***, 451 U.S. at 448 n.2 (Powell, J. dissenting). Simply because the first jury declined to impose the death penalty does not establish that the state failed to prove its case. Such analysis could be equally applicable to cases in which the second jury on remand in a non-capital case imposed a harsher sentence than the first jury, a situation which has been consistently allowed by this court. ***Stroud v. United States***, 251 U.S. 15 (1919).

Application of the Double Jeopardy Clause should not depend on the procedural niceties established by each State. A State could establish a capital or non-capital sentencing scheme that has a full range of sentences, not just the life imprisonment or death option in ***Bullington***. A state need not provide for jury sentencing. ***Clemons v. Mississippi***, 494 U.S. 738 (1990). The constitutional minimum required by this Court in ***Graham v. Collins***, 113 S.Ct. at 915-17 (Stevens, J. dissenting) could be utilized by a State without invoking the procedures rationale of ***Bullington***. The phrase "death is different" does not explain the procedures rationale in ***Bullington***.

As Justice Powell points out in his dissent in ***Bullington***, "[u]nderlying the question of guilt or innocence is an objective truth", 451 U.S. at 450.



The sentencer's function is not to establish the facts underlying the conviction, but rather to determine the punishment the jury sees fit. *Id.* This punishment is subjective and lies within the discretion of the sentencer. As long as the punishment imposed is within the allowable statutory range, the sentence cannot be determined erroneous.

The question is not whether the sentencing proceedings resembles a trial, but rather "whether the reasons for considering an acquittal on guilt or innocence as absolutely final apply equally to a sentencing decision imposing less than the most severe sentence authorized by law." *Id.* The past precedent of this court has clearly held that the Double Jeopardy Clause does not attach to sentencing decisions even if a defendant receives a greater sentence on retrial. In fact, this court itself said that there are "fundamental distinctions between a sentence and an acquittal, and to fail to recognize them is to ignore the particular significance of an acquittal." ***United States v. DiFrancesco***, 449 U.S. at 133.

The Double Jeopardy Clause applies to guilt or innocence because it prevents the possibility of a defendant's being tried after acquittal. "A retrial of a defendant once found to have been innocent 'enhanc[es] the possibility that even though innocent he may be found guilty.'" ***Bullington v. Missouri***, 451 U.S. at 451 (Powell, J. dissenting), *quoting* ***Green v. United States***, 355 U.S. at 188. Of course, this concern is *de minimis* given the extra

constitutional protections from the Eighth Amendment that are guaranteed by state and federal courts. Further, the States generally provide state-law procedural protections, guaranteed by the State courts, beyond the constitutional minimum. In these circumstances, the concerns of the Clause are not necessary.

The possibility of a higher sentence after retrial has been previously accepted by this court as "a legitimate concomitant of the retrial process." ***Chaffin v. Stynchcombe***, 412 U.S. 17 (1973). Therefore, this court's departure from that standard should be corrected by overruling the decision in ***Bullington***.



## CONCLUSION

Petitioner respectfully requests this court to issue a writ of certiorari to the United States Court of Appeals for the Eighth Circuit and reverse the judgment of that Court.

Respectfully submitted,

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